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No. 93-1579

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

DANNY VAUGHAN,

Petitioner,

v.

FIRST NATIONAL BANK of SHAMROCK, TEXAS, et al.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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PETITIONER'S REPLY BRIEF

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May 16, 1994

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Respondents' arguments emphasize the public importance of the issues of this petition. A potential denial of the fundamental rights of a debtor, or any citizen similarly situated, must be fairly and fully addressed by the federal courts in order to preserve the few absolute guarantees afforded by the Constitution of the United States.

This reply is in response to the two opposition briefs filed within the time limits set forth in Rule 15.2. Each *Brief in Opposition* was filed by an attorney who participated directly in the hearing in which the stay was modified, and each continue to represent parties that received substantial benefits from this esoteric stay modification and subsequent *ex parte* Texas divorce proceeding.

Respondents persist in going beyond the record to suggest notices. All parties were provided adequate opportunity to designate bankruptcy court documents for the appellate record. Petitioner, as did Respondents, could not identify any notice in the record at the time of filing the original adversary complaint in July 1992, that remotely notified interested parties of the hearing set for January 30, 1991, or documentation to support Respondents' contentions regarding the alleged distribution of the February 4, 1991 order to interested parties purportedly modifying the automatic stay. The record of this case is void of any item to support an argument that due process was afforded to the Petitioner.

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time, an unsigned, rubber stamp impression "Certificate of Mailing", asserting he discovered this indication of notice on the backside of the order. (Opp. Shew 4). This claim is not only outrageous, but contradicts Respondents' previous arguments (compare: Opp. Fling 5) claiming the opportunity to be heard and right to appeal were provided to all parties in interest including this Petitioner. This purported "Certificate of Mailing" suggests the order was only mailed to four lawyers: Fling, Shew, Bonney and Veith. Respondents argue this alleged mailing satisfied due process requirements. Nothing has been presented by Respondents, to demonstrate the waiver of rights by this Petitioner. It has been stated by this Court, for a waiver of constitutional rights in any context must, at the very *least*, be clear. *Fuentes v. Shevin,* 407 U.S. 67, 95 (1972). If the Petitioner has went beyond the record, as alleged by Respondents, it has been to address false and misleading arguments presented by the Respondents.

The introduction of the February 4, 1991 bankruptcy court order (Opp. Shew App.1) provides the opportunity to clearly demonstrate the constitutional invalidity in the text of the order itself. The order identifies the issue to be considered, correctly notes the absence of the Debtor, and states the ruling of the court on the issue before the court.

This order continues to recite the court then "sua sponte" modified the stay, an action, under the existing circumstances at the time, clearly violating the due process clause of Constitutional Amendment V., as well as the procedure detailed in 11 U.S.C. §362(d). Petitioner's claim does not conflict with the intent of Congress in 11 U.S.C. §105(a), as Respondents argue, due to a stated purpose in the specific language of the statute: "to prevent an abuse of process." This statute must not mutate to become a vehicle to avoid providing constitutional entitlements or any other requirements Congress has established in the other sections of the Bankruptcy Code.

I. The Court Should Grant The Petition To Clarify The Due Process Rights Of Debtors In Bankruptcy Proceedings.

Respondents argue that "Petitioner waived his right to contest the Bankruptcy Court's modification of the automatic stay" (Opp. Fling 7) by failing to appeal the order. This conflicts sharply with this Court's traditional insistence that an opportunity for a hearing must be provided before the deprivation at issue takes effect. *Fuentes v. Shevin,* at 82. Obviously, the spontaneous proclamation from the bankruptcy court modifying the stay in the absence of the

Petitioner precluded any opportunity for a prior or concurrent objection, comment or request for a hearing on the bankruptcy court's decision to modify the stay.

Second, Respondents argue that "the bankruptcy court did not abuse its discretion in modifying the automatic stay since that decision is within the sound discretion of the bankruptcy judge" (Opp. Fling 6), and "bankruptcy courts generally lift the stay to allow divorce proceedings to conclude." Opp. Fling 10. Respondents and the courts below cite numerous cases related to discretion of the court in the modification of a stay for divorce proceedings; however, they fail to note, not a single one of these cases involve the loss of the protection of the stay *sua sponte* without specific prior notice and the actual modification occurring in the absence of the debtors or any representative of the debtors as occurred in the instant case.

The Tenth Circuit's ruling in *Pursiful v. Eakin*, 817 F.2d 1501 (10th Cir. 1987) has been the primary authority in the lower courts; However, the courts below have refused to recognize that the *Pursiful* court specifically examined the record and events of the case to insure the fundamental requirements of due process were not violated prior to upholding the stay modification in that case. *Pursiful* at 1506.

Petitioner has been unable to identify any authority supporting Respondent's argument that a judicial official's discretion supersedes Petitioner's rights of due process.

Though the manner of modification of the stay may have been an unintentional error on the part of the bankruptcy judge, the error is of a constitutional dimension because the bankruptcy court was powerless to enter the order without specific prior notice in the absence of the Petitioner. The bankruptcy court's action in modifying the stay represents more than an abuse of discretion or error in the exercise of jurisdiction. This action was an usurpation of power, subjecting the order to collateral attack as void for want of due process. The subsequent acts of opportunistic creditors in the *ex parte* state court proceeding emphasize the necessity of assuring constitutional requirements are met in bankruptcy matters.

Respondents, conceding the modification proceeding could be constitutionally defective, now contend the modification of the stay was "implicit considering the January 30, 1991 hearing and [was] an inherent requirement of the administration of Petitioner's bankruptcy estate" with the notice requirements of 11 U.S.C. §362(d) being inapplicable. Opp. Fling 14. This argument implies the Petitioner could not

have made any impact upon the bankruptcy court's decision to modify the stay had he been noticed and present. This reasoning sharply conflicts with this Court's prior ruling stating "Where a person has been deprived of * * * due process, it is no answer to say that in this particular case due process of law would have led to the same result * * *" (internal quotation omitted). *Peralta v. Heights Medical Center*, 485 U.S. 80, 86-87 (1988). Respondents are grasping for justification for the failure to provide Petitioner the required opportunity to disclose his valid reasons for obtaining and his expectation of maintaining federal jurisdiction until such time a proper divorce proceeding could have been conducted absent of state corruption, thereby avoiding the predicable outcome of the creditors' clandestine property distribution following the stay modification in Wheeler County, Texas.

The order of February 4, 1991 modifying the automatic stay is void for want of due process of law, and should be vacated by this Court.

II. The Court Should Grant The Petition In Exercise Of Its Powers Of Supervision To Correct The Tenth Circuit's Refusal To Take Notice Of The Record Of The Case And Vindicate The Denial Of Petitioner's Federal Rights.

The courts below have made incorrect assumptions regarding notice of the January 30, 1991 hearing and the distribution of the February 4, 1991 order to avoid addressing the due process violations evident in the record and on the face of the order that modified the stay. The Tenth Circuit's preface in its opinion regarding the notice to Petitioner of the January 30, 1991 hearing (*Petition*, App. 2.) not only went beyond the record, the panel's preface contradicts the record then before the Tenth Circuit.

Although the appellate courts below needed to look no further than the bankruptcy court order of February 4, 1991 to identify the elementary and fundamental error in the stay modification, each court has carefully circumvented the spontaneous nature of the modification at the *ex parte* hearing that generated the order modifying the stay.

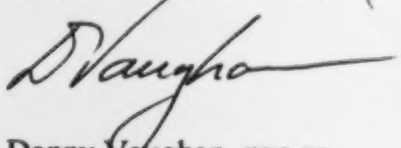
Each refusal to address the due process issues has created added hardship upon a *pro se* debtor now pursuing the only remaining remedy available, to obtain the discretionary jurisdiction of this Court, to correct the basic errors of federal officials in providing an improper avenue for creditors to defeat the federal bankruptcy laws under the color of state law. Respondents, with their numerous conflicts of interest, have an obvious need to avoid a proper

bankruptcy proceeding which would expose corruption in the courts of rural Texas. Federal assistance in the concealment of these kangaroo courts is shocking and deserving of an exercise of this Court's powers of supervision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.. Alternatively, the Bankruptcy Court order of February 4, 1991, modifying the stay is void for want of due process and should be summarily vacated by this Court.

Respectfully submitted,



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